IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1017

SCOTT GRANT, an infant,

Petitioner,

vs.

PARKE, DAVIS & CO.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Whether it is within the proper exercise of a trial court's discretion to rule against the admission into evidence at trial of answers to interrogatories which are irrelevant to the issues being litigated, likely to mislead the jury, cumulative or immaterial.

2. Whether it is within the proper exercise of a trial court's discretion to rule against the admission into evidence at trial of deposition testimony or testimony at trial which is irrelevant to the issues being litigated, likely to mislead the jury, cumulative or immaterial.

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in this case are those which appear in the Petition (at page 2), and Rule 61 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This is a diversity action in which Plaintiff-Appellant-Petitioner Scott Grant (hereinafter "Petitioner") seeks to recover for brain damage and attendant symptoms allegedly caused in the year 1961 by a series of inoculations of a vaccine manufactured by Defendant-Appellee-Respondent Parke, Davis & Co. (hereinafter "Respondent") and marketed under the trade name of Quadrigen. The action, originally commenced on December 2, 1969 in the United States District Court for the Southern District of New York, was transferred to the United States District Court for the Eastern District of Wisconsin by order dated January 12, 1971.

On October 31, 1974, Petitioner served Respondent with 89 interrogatories, consisting of multiple subquestions, which inquired into the history of the research, development, testing, production and marketing of Quadrigen from the date it was conceived (in the mid-1950's) through the present. Respondent, having unsuccessfully sought an extension of time, proceeded to answer all of these interrogatories on the basis of whatever information it was able to assemble by December 13, 1974. In January, 1975, Respondent notified Petitioner that additional records had been located, and, subsequently, Respondent filed further

answers to these interrogatories to reflect information contained in the previously undiscovered records.[1] These further answers also identified the records which were ultimately introduced into evidence by Respondent. Upon the trial, Petitioner did not (and could not) claim any prejudice or surprise by the introduction of such evidence.

On May 5, 1975, pursuant to a motion made by Petitioner, the trial court entered an order estopping the Respondent from litigating the issue of whether Quadrigen was a "defective" product. The case came on for jury trial on June 2, 1975. Because of the court's estoppel ruling, the only issues before the jury were whether Quadrigen was administered to the plaintiff and, if so, whether it caused his physical condition. After 16 days of testimony, argument and instruction, Respondent requested a special verdict in which the jury would have been required to separately answer the two remaining issues. Petitioner requested a general verdict and the court granted the latter request.

The jury returned a general verdict in favor of Respondent. Petitioner's motion for a new trial on the grounds of erroneous exclusion of evidence was denied by the District Court in an unreported opinion dated January 27, 1976. (A. 16-21) Petitioner appealed from the decision denying the motion for a new trial to the United States Court of Appeals for the Seventh Circuit. A three judge panel (Fairchild, C.J., Cummings, J., and Tone, J.) unanimously affirmed the judgment of the District Court in an unpublished order, dated October 27, 1976. (A. 1-15) Rehearing was not sought by Petitioner.

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[1] It is neither necessary nor appropriate to state herein the reasons why it was necessary to file these further answers. It is sufficient to note that both the trial court and the Court of Appeals reviewed the circumstances and were satisfied that this was both appropriate and fair to the Petitioner.

ARGUMENT

INTRODUCTION.

By issuing its decision as an unpublished order, the Court of Appeals has found that this case did not involve an issue of continuing public interest; did not establish a new or change an existing rule of law; did not resolve or create a conflict in the law; and only presented arguments concerning the application of recognized rules of law.[2] Thus, the Court of Appeals, after a careful review of the entire record below (as is apparent from its opinion) determined that, far from involving issues of broad national importance of the kind which might warrant the attention of the United States Supreme Court, this case actually involved no issues which are

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[2] Circuit Rule 35(c) of the Seventh Circuit provides that:

(1) "Published opinions:
Shall be filed in signed or per curiam form in appeals which:
(i) Establish a new or change an existing rule of law;
(ii) Involve an issue of continuing public interest;
(iii) Criticize or question existing law;
(iv) Constitute a significant and non-duplicative contribution to legal literature
(A) by a historical review of law;
(B) by describing legislative history; or
(C) by resolving or creating a conflict in the law; or
(v) Reverse a judgment or deny enforcement of an order when the lower court or agency has published an opinion supporting the order.

(2) Unpublished orders: . . .
(ii) May contain reasons for the judgment but ordinarily not a complete nor necessarily any statement of the facts, in appeals which
(A) are not frivolous but
(B) present arguments concerning the application of recognized rules of law, which are sufficiently substantial to warrant explanation but are not of general interest or importance."

even of general significance or interest to other courts or parties within the circuit.

A review of the trial and appellate court opinions in this case will confirm that there are no issues of any significance beyond the interests of the specific litigants herein.

I.

NO ISSUE OF GENERAL SIGNIFICANCE IS PRESENTED BY THIS CASE CONCERNING THE USE AT TRIAL OF INTERROGATORIES UNDER RULE 33 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The Petition, after setting forth the interrogatory answers which were not admitted into evidence by the trial court, charges that "the Trial Court and Court of Appeals have ignored the Federal Rules and applicable case law in refusing to permit the child to introduce the drug company's original answers to interrogatories." (Petition, page 18) As he did on appeal, Petitioner claims that under Rule 33(b), answers to interrogatories "may be used to the extent permitted by the Rules of Evidence." However, as noted by the appellate court, Petitioner himself ignores Rule 403 of the Federal Rules of Evidence which permits a court to exclude cumulative evidence or evidence that may mislead the jury. (A.9) Although Rule 403 did not become effective until after the completion of this trial, the Seventh Circuit noted that Wisconsin Rule of Evidence 904.03 is identical to Rule 403 and was correctly applied at the trial and furthermore, that "evidence of such remote probative value was properly excludable under standards antedating the Federal Rules of Evidence." (A.9)

In an attempt to create an issue for resolution by this Court, the Petitioner misrepresents the holding of the courts below stating, at page 22 of the Petition, that "[t]*he law is unanimous that the filing of subsequent*

answers, whether contradictory, supplemental or explanatory, is not a ground for excluding the original answers." The filing of the subsequent answers was not used by either court below as the ground for excluding the original answers. The grounds for excluding these answers were stated clearly in the opinion of the District Court and the Court of Appeals. With respect to the excluded answers to interrogatories which are allegedly inconsistent with later answers, the trial court stated that these answers were "largely irrelevant," that they did "not constitute proper impeachment" and that "to allow the answers plaintiff desires to be read into evidence would have improperly confused and misled the jury." (A.20)

The order of the Court of Appeals discusses each of the answers to interrogatories excluded individually and conclusively. (A.3-10) It is neither necessary nor appropriate in this response to the Petition for Respondent to set forth here those portions of the record below and the persuasive considerations which were the basis for the trial court's rulings and the Circuit Court of Appeal's affirmance. It is clear from the appellate court's observations with respect to each interrogatory excluded that in not a single instance was the filing of a subsequent answer, *per se*, the ground for excluding the original answer.

Thus, it was unequivocally held by both the trial court and the appellate court that the excluded answers to interrogatories were of little probative value and would only have served to mislead the jury, or were totally irrelevant because they related only to matters already resolved by the collateral estoppel ruling, and, that, in any event, they would not have constituted proper impeachment.

No authority *requires* the admission of answers to interrogatories under the circumstances of this case and Petitioner has offered none. The cases cited at pages 22 and 23 of the Petition (*Bauman v. Royal Indemnity Company*, 174 A.2d 585 (N.J. 1961); *Mangual v. Prudential Lines, Inc.*, 53 F.R.D. 301 (E.D.Pa. 1971); *State Farm Mutual Automobile Insurance Company v. Porter*, 196 F.2d 834 (9th Cir. 1951)), are all cases in which the proffered answers were relevant, material and otherwise admissible under the Rules of Evidence. No court has ever held or even suggested that all answers to interrogatories under Rule 33 must always be admitted, regardless of the rules of evidence or the evidentiary value of the answers. It is indisputable that all answers to interrogatories are not necessarily admissible at trial. *See, e.g., Nichols v. Philadelphia Tribune Company*, 22 F.R.D. 89 (E.D.Pa. 1958); *Gadaleta v. Nederlandsch-Amerekaansche Stoomvart*, 291 F.2d 212 (2nd Cir. 1961). Even if the rule were otherwise, it would not lead to a reversal of the decisions below in this case, because the Court of Appeals, after finding that the exclusions were proper, also held that the challenged exclusions, even if erroneous, were not prejudicial to the Petitioner. (A.10) Consequently, there is no issue concerning the use at trial of interrogatories under Rule 33 which could be resolved by granting a writ of certiorari in this case.

II.

NO ISSUE IS PRESENTED BY THIS CASE CONCERNING THE EFFECT OF THE DOCTRINE OF COLLATERAL ESTOPPEL ON THE ADMISSION OF EVIDENCE RELATING TO THE ISSUE COLLATERALLY ESTOPPED.

In an attempt to create an issue concerning the effect of the doctrine of collateral estoppel on the admission of evidence, the Petitioner again misstates the ground of the trial court's rulings:

> ". . . the Trial Court erroneously sustained the drug company's objections to evidence offered by the child on the remaining issues of whether Quadrigen was the drug used and whether it was the medical cause of the child's injuries, all *on the ground that the evidence offered also involved the issue of defect that had been collaterally estopped.*" (emphasis supplied) (Petition, pages 32-33)

The trial court's ground for excluding the items of evidence described at pages 33-35 of the Petition was not that they "also involved the issue of defect." With respect to the excluded answers to interrogatories, the trial court's grounds for exclusion were that the answers were "largely irrelevant", "did not constitute proper impeachment" and that to allow these answers to be read into evidence "would have improperly confused and misled the jury." (A.20) With respect to the testimony of witnesses that the trial court excluded, the ground for exclusion was that the testimony "would have been cumulative at best and more probably misleading and prejudicial to the defendant, since it was not probative of or relevant to the remaining issues in the case." (A.20)

The doctrine of collateral estoppel was not involved *per se* in the trial court's evidentiary decisions. The doctrine was only involved to the extent that it removed from the case, at Petitioner's instance, the issue of product defect. The trial court, having precluded Respondent from defending on that issue, correctly did not admit evidence which would be of probative value only on that issue. Exclusion of such evidence is among the most basic and clearly established functions of the trial court, and the Seventh Circuit Court of Appeals correctly sustained the trial court's exercise of this function with respect to every piece of excluded evidence offered by Petitioner.

III.

THERE IS NO CONFLICT AMONG FEDERAL COURTS CONCERNING ADMISSIBILITY UNDER RULES 32(b) AND 32(d)(3), F.R.C.P., OF EVIDENCE NOT OBJECTED TO DURING A DEPOSITION. THIS CASE PRESENTS NO ISSUE WITH RESPECT THERETO.

The Court should be aware that there is no conflict whatsoever to be found in the cases cited at page 40 of the Petition. Petitioner states: "A substantial number of cases generally permit objections at trial without their preservation during a deposition," citing *Union Central Life Insurance Company v. Burger*, 27 F. Supp. 556 (S.D. N.Y. 1939); *Lewis v. United Airlines Transport Corp.*, 27 F. Supp. 946 (D. Conn. 1939); *Houser v. Snap-On Tools Corp.*, 202 F. Supp. 181 (D. Md. 1962).

Union Central involved a motion to vacate and modify a notice of deposition on the grounds that the testimony to be taken, as described in the notice, would not be admissible at trial. The court denied the motion stating:

> ". . . in view of the liberality and freedom of action which were intended to be achieved under the new Rule [citation omitted], I do not think that the court should limit an examination on a motion of this type unless the information sought upon the examination is clearly privileged or irrelevant.
>
> "When a motion, such as this one, is made pursuant to Rule 30(b) before the examination, it may at times be difficult for the Court to pass upon the admissibility of evidence solely upon the pleadings and the affidavits submitted. In such a case the better procedure would be for the objecting party to raise the question of admissibility at the examination and by a motion under Rule 30(d) or when the deposition is used at the time of the trial pursuant to Rule 26(e)." (27 F. Supp., at 557)

The court's opinion does not touch, even tangentially, upon the issue of whether or in what circumstances

deposition testimony must be objected to at the deposition in order to preserve the objection to admission at trial.

Similarly, *Lewis* involved a motion to expunge a part of a subpoena which sought certain information through examination before trial on the grounds that the information sought would be inadmissible at trial. The court denied the motion, stating that:

> "The Rules of Civil Procedure provide ample opportunity to raise the claim of privilege during the taking of the depositions and to press objections based on the ground of a claimed privilege at the trial. Equally, the Rules contemplate that Aircraft through its subpoena may call for the information which it seeks and if objection develops, whether on the ground of privilege or on other grounds, obtain a final ruling by the court." (27 F. Supp., at 947)

The case has no relation whatsoever to the issue of when objection to deposition testimony is waived by a failure to make objection at the deposition.

Houser did involve objections to the use at trial of deposition testimony which had not been objected to at the taking of the deposition. However, far from generally permitting objections at trial without their preservation during the deposition, the court in *Houser* accepted into evidence deposition testimony over objection on the ground that the testimony was elicited through leading questions because no objection had been made at the taking of the deposition. The court, applying Rule 32, noted that the leading question was an example of "one of those defects which could be obviated if challenged at the time of the taking of the deposition." (202 F. Supp., at 188) *Houser* merely affirms the general rule, which was in no way departed from in the instant case. It does not represent the approach which Petitioner indicates that it does.

In short, Petitioner has cited no cases which "generally permit objections at trial without their preservation during a deposition." Nor would one expect to find any, in view of the clarity of Rule 32(d)(3).

On the other side of the alleged conflict among the federal courts are two cases which Petitioner says "hold the opposite." Petitioner cites *Cordle v. Allied Chemical Corp.*, 309 F. 2d 821 (6th Cir. 1962) and *Dudding v. Thorpe*, 47 F.R.D. 565 (W.D. Pa. 1969) to represent the rule "requiring objection at the deposition." (Petition, pages 40, 41) In both of the cases cited, deposition testimony was admitted over objection upon the ground that the testimony was not objected to at the taking of the deposition. However, in each case the court specifically found that the objections were such that if they had been made at the time the deposition was taken, the alleged defect could have been corrected. This was not involved in the instant case and neither of these cases are in any way in conflict with the cases cited for the alleged opposite position. No conceivable interpretation of Rule 32(d)(3) would support either the approach of always admitting deposition testimony which was not previously objected to, or the approach of never requiring prior objection.

As stated by the trial court, the excluded deposition testimony of Dr. Millichap was excluded because:

> ". . . This testimony dealt with prior claims against the defendant and the issues of negligence and defect which the parties had been collaterally estopped from relitigating. Such testimony, given the court's ruling, would have been cumulative at best and more probably misleading and prejudicial to the defendant, since it was not probative of or relevant to the remaining issues in the case." (A.20)

No suggestion is made by Petitioner as to how this defect might have been obviated, removed or cured if

presented at the deposition, except to state that the defendant's objection at trial came "at a time when it was too late for the child's counsel to put these matters in on redirect examination." (Petition, page 44) The point of the trial court was that objections to such questions, were they to be put at trial, would have been sustained. The irrelevancy in this trial of Dr. Millichap's testimony about other Quadrigen cases against Parke, Davis would not have been cured by putting it back in on redirect examination. It would have been equally irrelevant regardless of who asked the questions.

Rule 32 is clear on the issue of whether and when it is necessary to preserve an objection to testimony received during a deposition in order to have it ruled upon at the trial and no conflict exists in the federal courts on this issue. No misapplication of Rule 32 occurred in the case at bar.

IV.

NO ISSUE IS PRESENTED IN THIS CASE AS TO WHETHER ERRONEOUS EXCLUSION OF EVIDENCE OFFERED BY THE LOSING PARTY IS GROUND FOR A NEW TRIAL EVEN THOUGH THERE IS OTHER EVIDENCE IN THE RECORD THAT WOULD HAVE SUPPORTED A VERDICT IN FAVOR OF THAT LOSING PARTY.

Petitioner again misconstrues the grounds for the decision by the Court of Appeals when it states that the appellate court rejected his request for a new trial "on the ground the record contained evidence that 'was credible and probative of the remaining issues in the case,' " and "on the ground that 'as shown in both briefs of plaintiff, the record was replete with evidence favorable to the child.' " (Petition, page 46) Rather, the Court of Appeals squarely considered the issue whether the trial court erroneously excluded evidence that should have been heard by the jury, and held that it did not,

because each and every one of the exclusions challenged by Petitioner involved evidence which was of remote probative value and/or likely to mislead the jury and/or chiefly cumulative.

Petitioner quotes the statement made by the Court of Appeals that:

> "Although we might have permitted plaintiff to introduce some or all of these ten answers if we had been trying this case, we are fully satisfied that their admission would not have tilted the scales in plaintiff's favor." (Petition, page 49)

It is charged by the Petitioner that in so stating the Court of Appeals was engaging in "guessing" about the weight the jury might have given to the excluded answers to interrogatories. The quoted language directly follows a discussion by the Court of Appeals as to why the excluded evidence was properly excluded. In this context the Seventh Circuit is clearly saying no more than that the trial judge properly exercised his discretion in making the challenged evidentiary rulings and that the challenged exclusions, if error at all, were not prejudicial to Petitioner and thus fell within the "harmless error" rule.[3]

The appeals court correctly distinguished *Vincent v. Thompson*, 377 N.Y.S. 2d 118 (App. Div. 1975) for the reason that there the collateral estoppel ruling caused plaintiffs to fail to present evidence which may have been

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[3] Rule 61 F.R.C.P. reads as follow:

"HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

relevant to the establishment that the injuries sustained came from the injection of Quadrigen. As the opinion of the Seventh Circuit points out,

> ". . . Unlike that case, this plaintiff was afforded ample opportunity to present a plethora of evidence showing that Quadrigen had been administered to him and had caused his serious ailments. Nevertheless, the jury chose to believe defendant's substantial contrary evidence." (A.15)

That some of the evidence offered at trial by Petitioner was rendered irrelevant by the collateral estoppel ruling provides no basis for Petitioner's claim that "the child was *precluded* from presenting the evidence on both the medical cause and the identification issues." (Petition, pages 49, 50) It provides no basis for comparison of this case with *Vincent v. Thompson, supra.*

The trial court's denial of Petitioner's motion for a new trial was not on the ground that there is evidence in the record which would have supported a verdict for Petitioner, nor did the Seventh Circuit uphold the denial of a new trial on this ground.

CONCLUSION

Each and every evidentiary ruling which is contested in the Petition was made by the trial court on the basis of fundamental and well-accepted rules of evidence and principles governing the conduct of trials. Analysis of the appendix to plaintiff's petition makes it evident that this case does not involve issues of interest or importance outside of the case at bar. The Court of Appeals so determined when it issued an unpublished order in this case.

We ask that the Petition for Certiorari be denied.

Respectfully submitted,

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